

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3 -----x

08-CR-823 (NGG)

4 UNITED STATES OF AMERICA,

United States Courthouse
5 Plaintiff, Brooklyn, New York

6 -against-

7 April 20, 2017
8 2:00 p.m.

9 BRYANT VINAS,

10 Defendant.
11 -----x

12 TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
13 BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
14 UNITED STATES SENIOR DISTRICT JUDGE

15 APPEARANCES

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1 (In open court.)

2 THE COURTROOM DEPUTY: Please be seated. Criminal
3 cause for motion.

4 Counsel, could you state your appearances, please.

5 MR. TUCKER: Good afternoon, Your Honor. Rich
6 Tucker, David Kessler and Seth DuCharme for the government.

7 THE COURT: Good afternoon.

8 MR. ZISSOU: Mr. Vinas is represented by Steve
9 Zissou and Michael Bachrach. We're both present. Mr. Vinas,
10 as the Court knows, has allowed us to waive his appearance.
11 He's agreed not to attend today's proceeding. However, his
12 father and sister are in the audience just so that their
13 presence is noted on the record.

14 THE COURT: Thank you very much and welcome.

15 There is a motion to conduct a sealed proceeding
16 here. Would you speak to that, sir.

17 MR. TUCKER: Your Honor, yes. I believe it's the
18 defense's motion because underlying it is their broader
19 request for discussion.

20 THE COURT: Oh, that's right. Your motion.

21 MR. ZISSOU: Judge, we have simply tried to comply
22 with procedures, we think, applicable actually. Were it up to
23 us, there would be no Classified Information Procedure Act.
24 We are not here to defend it, simply as often the Court do
25 comply with it. We do think, however, that this discussion

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1 will necessarily involve a discussion of classified
2 information which the public is not privy to, and there are
3 some things we can address prior to doing that, if the Court
4 would like to do so. My understanding is the procedure is to
5 do as much as Your Honor can in open court, and then when one
6 or both of the parties think now is the time to unpack the
7 request about stuff, we can do that. I don't know that there
8 is. I certainly can explain to Your Honor what our concerns
9 are and why we have asked for a private or classified
10 conference with the Court. I don't think that would divulge
11 any state secrets.

12 THE COURT: Before you go there, let me hear from
13 the government.

14 MR. TUCKER: Your Honor, I think we can accomplish
15 some things in open court here today first and I'm happy to do
16 that.

17 THE COURT: Like what?

18 MR. TUCKER: I think the defense counsel filed a
19 letter today, this morning.

20 THE COURT: Oh, yes.

21 MR. ZISSOU: Judge, you know, there was a footnote.

22 THE COURT: I read the footnote. I read all
23 footnotes of your letters as well as the text, but this letter
24 is 11 pages long.

25 MR. ZISSOU: It's lengthy, Judge.

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1 THE COURT: And obviously you didn't come up with it
2 at 1:00 in the morning last night, and so I'm just wondering
3 why it is that you shared these pearls of wisdom, you know,
4 with me the morning of a conference.

5 MR. ZISSOU: Well, so --

6 THE COURT: Without giving the other side the
7 opportunity to comment in writing, which would be most helpful
8 to the Court.

9 MR. ZISSOU: And was that not our intention. But we
10 went back and forth over the last few days trying to decide
11 whether it made more sense to discuss some of these issues
12 during oral argument and then follow it up with briefing, and
13 then I think we made so much progress in terms of developing
14 the issues that, you know, late last night we decided we
15 better just file this thing now and let them see it in the
16 morning. It was certainly not our intention --

17 THE COURT: This was filed publicly on ECF.

18 MR. ZISSOU: It is publicly filed. We certainly
19 don't and it was not our intention to undermine the
20 government's positions here. Indeed if they need time to
21 respond or something, we have no objection to that or
22 proceeding on a different day.

23 THE COURT: Well let me just point out that one of
24 the Court's concerns is that we resolve the sentencing of the
25 defendant with all deliberate speed.

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1 MR. ZISSOU: Yes.

2 THE COURT: To borrow a phrase from a very
3 well-known Supreme Court decision. But what we mean by that
4 is as promptly as possible.

5 MR. ZISSOU: Of course.

6 THE COURT: Without dragging our feet. And I think
7 that the defendant, who's been in jail for nine years --

8 MR. ZISSOU: Correct.

9 THE COURT: -- awaiting this day or a day, is
10 interested in achieving that objective. So I wouldn't want to
11 extend the process any more than is absolutely necessary.

12 MR. ZISSOU: Of course, Your Honor. We appreciate
13 that as well. And certainly as I said it was not -- those are
14 one of those things that happened late at night and we said we
15 better just give this to the Court in the morning and not
16 stand here and go on and on about various legal issues and the
17 Court not having at least a clue of where we were coming from.

18 MR. TUCKER: Your Honor.

19 MR. ZISSOU: I beg Your Honor's indulgence.

20 THE COURT: That's all right. But I do point out
21 that this arrived on my desk this morning sometime. Yes.

22 MR. TUCKER: Your Honor, I'm happy to take my cues
23 from the Court about how much Your Honor wants to do out in
24 open court and back in our closed proceeding.

25 As Your Honor notes, the objective here more broadly

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1 is to move these proceedings forward. Obviously the
2 government's preference earlier on was to not and now we've
3 proceeded diligently and worked hard to get submissions to the
4 Court.

5 THE COURT: I'm sorry, earlier on your preference
6 was not to move it?

7 MR. TUCKER: That's correct, Your Honor. As was
8 stated I think when we appeared before Your Honor earlier this
9 fall, we talked about the fact that the defendant --

10 THE COURT: You mean last fall.

11 MR. TUCKER: Yes, Your Honor, I apologize, 2016. We
12 talked about the possibility that the defendant's cooperation
13 could be ongoing, and we discussed the possibility of
14 postponing sentencing. And now our understanding, and I want
15 to be correct if I'm mistaken on this point, was that the
16 defendant and his counsel wanted to move forward. So that's
17 the framework that we're operating under.

18 THE COURT: Is that a fair assessment --

19 MR. ZISSOU: It is, Your Honor.

20 THE COURT: -- of your position and your client's
21 position?

22 MR. ZISSOU: It is, Your Honor, however, he has been
23 mindful of his obligation to continue to cooperate. He will
24 be anywhere at any place at any time the government directs.
25 So he's not giving up on Mr. Tucker and the government gave

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1 him the option of waiting or proceeding to sentence, he chose
2 the option to proceed to sentence for all the reasons Your
3 Honor outlined earlier today, and that remains his position
4 today.

5 MR. TUCKER: So, Your Honor, with that framework in
6 mind, I'm happy to respond to the defendant's letter of this
7 morning.

8 THE COURT: Well, why don't we do that so that
9 assuming that it can be responded to without divulging any
10 state secrets or other confidential information that would put
11 the security of the United States at risk.

12 MR. TUCKER: I think that it can, Your Honor. And I
13 should caveat it by saying that obviously I've had this letter
14 for a few hours. So we have not had the opportunity to
15 conduct the research that we might otherwise conduct.

16 THE COURT: You mean on the law?

17 MR. TUCKER: On the law, Judge. But if Your Honor
18 has questions, I hope we'll have the opportunity to address
19 those.

20 THE COURT: Well, I don't know that we haven't
21 delved into the law on this put forward here, but the basic
22 information I think is straightforward.

23 MR. TUCKER: I think that's right, Your Honor.

24 The point that I would make is this --

25 THE COURT: And whether it applies to this case is

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1 really something that could be debated.

2 MR. TUCKER: I think that's exactly correct.

3 THE COURT: Because this is a post-plea situation
4 where the only matter to be resolved is the sentence, so.

5 MR. TUCKER: Your Honor, I think that's exactly
6 right. I think it is a pretty radical extension of Brady to
7 suggest that Brady and its progeny placed some kind of burden
8 on the government to provide defense counsel with information
9 about a defendant's cooperation not relating to his
10 culpability but relating to the consequences of that
11 cooperation. I don't think that the law is there. And
12 obviously I only had a few hours to read the letter. What
13 strikes me about it is I don't think Mr. Bachrach could find
14 any authority to support that. He cites to Brady and that's
15 it. I think it's important that we have this discussion about
16 what the party's obligations are.

17 THE COURT: Well, we can break new ground, which is
18 I'm sure your objective here.

19 MR. TUCKER: Always, Your Honor. But anyway, I
20 think the framework that we're talking about really, Judge, is
21 our cooperation agreement and whether the government has
22 abided by the terms of that agreement.

23 We have made our application under 5K, and we have
24 provided the Court and defense counsel with detailed facts to
25 support our motion to describe the defendant's substantial

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1 assistance. We've met our obligations under the cooperation
2 agreement and under due process. I don't think the law
3 supports the idea that we should be required to answer
4 interrogatories from defense counsel about attenuated outcomes
5 that may or may not have occurred. We submitted a detailed
6 package to Your Honor and the defense and that meets our
7 obligations.

8 I'm happy to address specific questions, Your Honor,
9 but that's the government's sort of core concept here, is that
10 Brady doesn't move the needle in the broader legal analysis.

11 MR. ZISSOU: So, Judge, let me, if I might, sort
12 of -- if Your Honor is prepared to hear me again.

13 THE COURT: Of course.

14 MR. ZISSOU: So I think certainly what Mr. Tucker
15 says is well taken, although he is sort of one off of the
16 Brady decision, the Supreme Court decision that applies the
17 constitution in more than just pretrial proceedings, it
18 continues to apply it by the government. So I'm a little
19 concerned about Mr. Tucker's minimization, if you will.

20 But here's what really creates the problem for us.
21 And I'm only referring now to what Mr. Tucker referred to,
22 which is the unclassified 5K letter and the other unclassified
23 materials that were submitted to you.

24 Given what we know about the last decade and what is
25 I think a well-known fact that al-Qaeda's operational

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1 capability has been severely diminished over the last ten
2 years, given what is in the classified material alone, one
3 could draw the inference --

4 THE COURT: You mean the declassified material.

5 MR. ZISSOU: I'm sorry, the unclassified, the 5K
6 letter alone, one can draw the inference that Mr. Vinas was
7 the proximate cause of that diminished operational capability.
8 And when I say that, I in no way mean to diminish our military
9 and the actions of the Executive Branch all the way down to
10 Mr. DuCharme's unit here in the Eastern District of New York
11 and all of the people who work hard to make sure that American
12 citizens and people all over the world are safe. But one
13 could draw the inference that but for Mr. Vinas' cooperation
14 with the government, al-Qaeda is still a highly-functioning
15 machine capable of doing the kinds of things that they did
16 more than a decade ago in the United States. And that's not
17 something Your Honor should have to infer. Your Honor should
18 know that if that's -- if that's really what we say happened
19 here, because that's the way it looks to us.

20 Again, I won't go into our follow-up submissions to
21 the Court and how it relates --

22 THE COURT: But that statement would refer to
23 conclusions that could be reached as opposed to facts that
24 could be discerned about specific assistance that your client
25 gave to law enforcement, for instance.

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1 MR. ZISSOU: Well --

2 THE COURT: Right? I mean you don't -- I mean what
3 your client specifically did or said or advised is something
4 that you have access to from your client, correct?

5 MR. ZISSOU: Correct.

6 THE COURT: The consequences of that are something
7 that one could discern from the current status of terrorist
8 organizations in the Pakistan and Afghanistan area.

9 MR. ZISSOU: Yes, that's certainly true but, again,
10 I just want to -- just --

11 THE COURT: I'm just trying to understand what it is
12 you think you need that you don't already have.

13 MR. ZISSOU: Well, just a way of pointing out, what
14 the client says or a lot of what the client says to us is
15 presumptively classified as well. So I'm not referring to any
16 of that now. In other words, I'm not free to discuss what the
17 client says to me that is reasonably something that --

18 THE COURT: In other words, you couldn't argue based
19 upon some of that material which is not subject to --

20 MR. ZISSOU: Right.

21 THE COURT: -- confidentiality.

22 MR. ZISSOU: I certainly won't, but it's also
23 presumptively classified as well. So I'm not referring to
24 that right now in substance. What I'm simply saying is you
25 need to know, look, whatever the law may be, what we know is

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1 3661 of Title 18 makes it clear that there's no limitation on
2 what a judge may consider in determining a sentence.

3 THE COURT: Well, I have material that's been
4 redacted.

5 MR. ZISSOU: You do.

6 THE COURT: For your purposes.

7 MR. ZISSOU: You do, and if Your Honor is --

8 THE COURT: I do know how to read.

9 MR. ZISSOU: If Your Honor's prepared to embrace my
10 suggestion that an inference be drawn that his cooperation was
11 the proximate cause of the diminished capability of al-Qaeda
12 over the last decade, then we're good to go.

13 MR. TUCKER: Your Honor, I don't want --

14 THE COURT: I know what you said but I'm not
15 understanding the jump that you propose.

16 Go ahead.

17 MR. TUCKER: And, Your Honor, I think that's exactly
18 right. I'd like to stay focused on what we're talking about.

19 THE COURT: That would be helpful.

20 MR. TUCKER: Defense counsel has been provided with
21 an enormous amount of information, nearly everything that the
22 Court was provided with.

23 THE COURT: I think that that's true.

24 MR. TUCKER: If the argument here is that the
25 government hasn't met its burden under the cooperation

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1 agreement and has not accurately described for the Court the
2 substantial assistance provided, that's one thing. But I
3 don't think that's what defense counsel's arguing. What we're
4 really talking about is defense counsel wants everything the
5 Court got, and as we've explained, a handful of particular
6 pieces of information were deemed so sensitive by the relevant
7 stakeholders that only Your Honor could be provided with that
8 information.

9 I also would note that those extremely limited
10 portions, as we indicated, were positive about the defendant.
11 We wrote a footnote in the classified letter that says that
12 the redacted portions are positive about the defendant and
13 that reasonable inferences could be drawn. I think Mr. Zissou
14 can make whatever argument he wants about the impact of the
15 defendant's cooperation, as Mr. Zissou and Mr. Bachrach wrote
16 in our letter -- in their letter. In our letter, our
17 unclassified publicly-filed letter, we indicated that
18 Mr. Vinas was an exceptional cooperator, among the most
19 important in the government's work against al-Qaeda.

20 The defense is well positioned to advocate on behalf
21 of their client. And respectfully, Your Honor, Your Honor is
22 able to review these materials without defense counsel needing
23 to see everything and comment on it. Your Honor's a
24 sophisticated consumer of this information. Your Honor has
25 the complete picture. Your Honor's in a good position to make

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1 those determinations. So we're talking again about a very
2 narrow dispute, and it's the government's position that we
3 have met our obligations and that no further disclosures are
4 required.

5 MR. ZISSOU: Well, it's not a narrow dispute. We
6 also submitted to the Court a CIPA document that requested
7 answers to certain questions, and that's really what drives
8 this proceeding today.

9 And I certainly understand that Mr. Tucker wants to
10 make the cooperation a living document, certainly Mr. Vinas is
11 bound by its terms, however, the Court is not. The Court is
12 not limited to what the government promised Mr. Vinas they
13 would say and do. The Court, there is no limitations, and
14 what I submit to you, Judge, is you -- certainly I think, we
15 think we're entitled to see it, too, but more than anything we
16 think you should see it because you're the one who's imposing
17 sentence here, and as a result you're the most important in
18 the world.

19 So it's not enough that I think that a reasonable
20 inference could be drawn that Mr. Vinas is the proximate cause
21 of al-Qaeda's destruction, if you will, over the last ten
22 years, but it's more important that Your Honor understand the
23 essential role that he played. Because if that's true, and it
24 appears to be true simply from the unclassified material, that
25 he didn't just provide substantial assistance to the

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1 government, he saved lives. And lots of them. Countless,
2 nameless, faceless victims of the same kind that
3 Mr. DuCharme's unit tries to save every day. Preventing
4 people who are future victims but never get to because of the
5 work they do.

6 And if that's the role that he played, we shouldn't
7 be talking in terms of he was a very important cooperator, it
8 should be unequivocal to you that this is the most unique
9 individual who's ever cooperated, well, presumably since World
10 War II. I imagine then lives were -- people did things that
11 saved lots of lives. But this young man saved countless lives
12 of people who will never know that they were about to be
13 victims. And if that's the case, then I submit to you that 5K
14 letter, as far as it is, as helpful as it is, is not as good
15 as it should be. It doesn't give this Court what it needs.
16 Respectfully, Judge.

17 THE COURT: Is there anything else that can be
18 discussed in public before I rule on the sealing of the
19 proceeding? Is there something else that we need to talk
20 about?

21 MR. ZISSOU: No, Your Honor.

22 THE COURT: That's it?

23 MR. ZISSOU: I think that's it, Your Honor.

24 THE COURT: Anything from the government?

25 MR. TUCKER: No, Your Honor, thank you.

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1 THE COURT: All right. Okay. Is there anyone else
2 who would like to speak before I rule on the application?

3 Mr. Riley, please. John Riley from Newsday. Yes,
4 sir, please.

5 MR. RILEY: Judge, I sent up a letter to your
6 chambers in the mailbox a few hours ago and I provided a copy
7 to the two attorneys. Did you receive it?

8 MR. ZISSOU: I'm handing it up.

9 THE COURT: I have not, but I will read it now, if
10 you don't mind.

11 MR. ZISSOU: There are two letters that I've handed
12 up to him.

13 THE COURT: Two letters?

14 MR. RILEY: The second --

15 THE COURT: I see.

16 MR. RILEY: One relates to the disclosure and the
17 another one relates to another sealed item.

18 THE COURT: I'll hold off on the sealed letter and
19 just discuss the closure of the courtroom letter right now.
20 That's what relevant to this discussion.

21 MR. RILEY: Yes.

22 THE COURT: Thank you very much.

23 The letter's dated April 20th. Everyone's writing
24 letters to me on April 20th.

25 MR. ZISSOU: Your Honor, the government has been

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1 kind enough to give their copy to your clerks.

2 THE COURT: Thank you.

3 (Pause.)

4 THE COURT: All right, this letter I'm going to mark
5 as Court's Exhibit 1.

6 Any comment from the government about the letter?

7 (Court Exhibit 1, was received in evidence.)

8 MR. TUCKER: No, Your Honor. Based on defense
9 counsel's proffer of need for the conference, the government
10 believes that closing the courtroom and proceeding in a sealed
11 proceeding is necessary to avoid the inadvertent disclosure of
12 classified information.

13 THE COURT: Okay, thank you.

14 Notwithstanding the objection set forth in
15 Mr. Riley's letter, the Court believes that it is necessary to
16 conduct a sealed, classified status conference and concluding
17 that conducting such a conference appropriately, quote,
18 balances competing considerations against, end quote, any
19 public right of access and is, quote, essential to preserve
20 higher values, end quote, as discussed in *Lugosch*,
21 *L-U-G-O-S-C-H*, v *Pyramid Company of Onandaga*, 435 F.3d 110 at
22 120, Second Circuit 2006, and *United States v Aref*, A-R-E-F,
23 533 F.3d, 72 at 82, Second Circuit 2008, such bases would
24 include avoiding the inadvertent disclosure of classified
25 information to parties without the requisite security

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1 clearances and protecting the national security of the United
2 States.

3 The Court has reviewed the redacted materials and
4 believes that such materials are covered under the bases that
5 I've identified as they are significant and sensitive
6 materials that affect national security. So the application
7 is granted.

8 And that means that if there's nothing else for the
9 public, we'll proceed to a sealed proceeding.

10 MR. ZISSOU: Very well, Your Honor.

11 THE COURT: Which will be conducted in another
12 location.

13 (Recess was taken.)

14 (Continued on next page.)

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1 THE COURT: All right, on the record in open court.

2 The Court would like to set a new sentencing date
3 for the defendant, and let me ask the parties how long you
4 think it will take to complete the submission of the
5 sentencing memoranda that have -- or additional sentencing
6 memoranda in this case?

7 MR. TUCKER: Your Honor, from the government's
8 perspective the government is done. The only possibility is
9 we would want to reply to defense counsel. I don't anticipate
10 that. But we could file a reply within a few days, if any.
11 It's really up to defense counsel.

12 THE COURT: Well, what I know now is that defense
13 counsel can work all night and provide us with papers at 8 in
14 the morning, so.

15 MR. BACHRACH: Your Honor, I had no choice but to
16 work all night, Your Honor. It's been a busy week.

17 THE COURT: Okay. So how much time do you think you
18 need?

19 MR. BACHRACH: To also have an opportunity to get
20 those additional transcripts, would three weeks be acceptable?
21 I think that would be to May 11th.

22 THE COURT: All right, let me look.

23 (Pause.)

24 THE COURT: May 11th at 2 p.m.

25 MR. BACHRACH: For the defense submission?

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1 THE COURT: Oh, for the submission? Do you need
2 that much time?

3 MR. BACHRACH: The only reason I'm asking for so
4 much time, Your Honor, is I'm currently in the middle of an
5 authorized capital case in the District of New Jersey and
6 we're preparing for an Atkins hearing, and I know Your Honor
7 and anyone knows the difficulty of an Atkins hearing, there's
8 a lot that's going on with that briefing.

9 THE COURT: Have you read the Moore decision?

10 MR. BACHRACH: I have, Your Honor, and I'm quite
11 pleased by it.

12 THE COURT: All right.

13 MR. BACHRACH: We would also give the court reporter
14 sufficient time as well as the stakeholders sufficient time as
15 well, Your Honor.

16 THE COURT: When is your Atkins hearing?

17 MR. BACHRACH: The Atkins hearing is June 6th.

18 THE COURT: Have you already made a submission?

19 MR. BACHRACH: Our reports, simultaneous exchange
20 expert reports is due --

21 THE COURT: No, no, no, I mean in this case.

22 MR. BACHRACH: A sentencing submission? No.

23 THE COURT: I really need to conduct this sentencing
24 in May.

25 MR. BACHRACH: I can endeavor to get --

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1 THE COURT: How about Friday, May 5th for your
2 submission?

3 MR. BACHRACH: That will be fine. We'll make it
4 happen, Your Honor.

5 THE COURT: Thank you. And then --

6 MR. ZISSOU: Judge, when you're looking at the
7 calendar, let me just point out by the grace of God our son is
8 graduating on May 20th in California, so we should be out
9 there probably from the 17th to the 25th maybe.

10 THE COURT: Well, and the government's response by?

11 MR. TUCKER: Your Honor, if their papers are due on
12 5th, we'll file anything by the 8th.

13 THE COURT: All right, the 8th --

14 MR. TUCKER: The morning of the 8th. But again I
15 don't anticipate us filing anything, Judge.

16 THE COURT: All right, that's fine. The 8th for the
17 government to file a response, and the 11th of May at 2 p.m.
18 for sentencing.

19 MR. TUCKER: That works for the government, Your
20 Honor.

21 THE COURT: That's a Thursday.

22 MR. TUCKER: Yes, Your Honor.

23 THE COURT: All right.

24 MR. BACHRACH: It works for the defense, Your Honor.

25 THE COURT: All right, so that's the schedule.

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1 Anything else from the government for today?

2 MR. TUCKER: No, Your Honor. Thank you.

3 MR. ZISSOU: No, Your Honor. Thank you.

4 THE COURT: Okay, thank you everyone. Have a nice
5 day.

6 MR. BACHRACH: Thank you, Your Honor.

7

8 (Whereupon, the matter was concluded.)

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10 * * * * *

11
12 I certify that the foregoing is a correct transcript from the
13 record of proceedings in the above-entitled matter.

14

15 /s/ Linda D. Danelczyk

April 20, 2017

16 LINDA D. DANELCZYK

DATE

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